

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	:	17-CR-00177(ENV)
	:	
	:	
-against-	:	United States Courthouse
	:	Brooklyn, New York
	:	
	:	Thursday, November 7, 2019
BLAISE CAROLEO,	:	2:30 p.m.
	:	
Defendant.	:	

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TRANSCRIPT OF CRIMINAL CAUSE FOR PRETRIAL CONFERENCE  
BEFORE THE HONORABLE ERIC N. VITALIANO  
UNITED STATES DISTRICT COURT JUDGE

A P P E A R A N C E S:

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1 THE COURTROOM DEPUTY: All rise. Court is now open.  
2 The Honorable Eric N. Vitaliano presiding. Case on the  
3 calendar is USA versus Caroleo, case number 17-CR-167, on for  
4 a pretrial conference.

5 Will the attorneys please note their appearance  
6 beginning with Government counsel.

7 MS. ARGO: Good morning, Your Honor. Erin Argo and  
8 Alicia Washington for the United States.

9 THE COURT: Good afternoon.

10 MS. SELTZER: Good afternoon, Judge, my client is  
11 present.

12 THE COURTROOM DEPUTY: Note your appearances.

13 MS. SELTZER: Marion Seltzer for the defendant  
14 Blaise Caroleo.

15 SULLIVAN-BENNIS: And Shelby Sullivan-Bennis.

16 THE COURT: Good afternoon as well, and to Mr.  
17 Caroleo.

18 THE COURTROOM DEPUTY: Counsel for both sides are  
19 present, and defendant.

20 THE COURT: Good afternoon to you all. We are here  
21 for the final pretrial conference before trial. The  
22 Government has filed in limines. So, Ms. Argo, I will let you  
23 set the agenda. And, Ms. Seltzer, if you have things to add  
24 to that agenda when the Government has finished, we will turn  
25 to that and take care of anything else that needs to be taken

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1 care of.

2 MS. ARG0: Thank you, Your Honor.

3 THE COURT: You can pick your order.

4 MS. ARG0: Thank you, Your Honor. My colleague, Ms.  
5 Washington, may sort of interject, if that is all right.

6 THE COURT: That is fine. That is fine on both  
7 sides.

8 MS. ARG0: Thank you, Your Honor.

9 With respect to the messages contained within the  
10 extraction reports that the Government intends to be in  
11 evidence in this trial, they do contain some uncharged conduct  
12 and in addition to that, there are also text messages between  
13 the actual victims and the defendant. In relation to those  
14 conversations, clearly the defendant's own statements are  
15 admissions and they are non-hearsay under 801(d)(2) and with  
16 respect to the responses --

17 THE COURT: Let's do this in two parts. Let's  
18 assume for purposes of this part of the motion that everything  
19 you just said is gospel and we are ready to go. Where are we  
20 go with the size? There are thousands of these things. What  
21 does the Government think its game plan is with respect to the  
22 exhibits that they want to use at trial?

23 MS. ARG0: So with respect to the exhibits that the  
24 Government is going to use at trial --

25 THE COURT: You propose to use.

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1 MS. ARG0: That we propose to use, yes, Your Honor.  
2 -- there are several excerpts from the actual larger phone  
3 reports that we have, in fact, already prepared as sort of  
4 little excerpts from that same exhibit so that it kind of --  
5 taken into smaller pieces with respect to this uncharged  
6 conduct.

7 THE COURT: Some of the smaller pieces that I was  
8 reviewing with Mr. Herman went on for pages and pages and  
9 pages.

10 MS. ARG0: Your Honor --

11 THE COURT: Over days, weeks, and months.

12 MS. ARG0: Yes, Your Honor. These conversations,  
13 the Government does not intend for those to be read allowed in  
14 their entirety. In some instances, the Government has  
15 presented only just a one-page statement. And with respect to  
16 the ones that are 10 pages long, in no shape or form does the  
17 Government intend to read those allowed from beginning to end.  
18 There are certain portions within those sub-exhibits that the  
19 Government would seek to simply read back and forth briefly to  
20 the jury.

21 THE COURT: So I got the impression that some of  
22 those impressions were a lot longer than ten pages. Did I  
23 have a misimpression?

24 MS. ARG0: The full reports, Your Honor, the full  
25 extraction reports are voluminous.

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1 THE COURT: I know the full reports go on forever  
2 and ever. This only goes on for a year and a day.

3 MS. ARG0: So with respect to the other sub-exhibits  
4 that we have pulled, they are actually about 10 pages. I  
5 don't believe, as I'm thinking about this right this minute,  
6 that there are any in excess of 10 pages from those. Perhaps  
7 they might be one that is 15. I have them here as well.

8 THE COURT: I think they are in the 400?

9 MS. ARG0: There are two chats, Your Honor, one with  
10 a third-party.

11 THE COURT: Correct.

12 MS. ARG0: Which is actually --

13 THE COURT: That's the one that I was thinking  
14 about.

15 MS. ARG0: So, yes, there is one conversation in  
16 which the defendant engages in the trading of child  
17 pornography. That conversation does go on for some bit.  
18 Again, we are not intending to read the entire conversation.  
19 There are certain portions --

20 THE COURT: We will cut to the chase. You are going  
21 to chop it down.

22 MS. ARG0: Yes, Your Honor.

23 THE COURT: It is not going to the jury for pages  
24 and pages and things that start in October and end in January.

25 MS. ARG0: Okay.

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1 THE COURT: It's cumulative and it's not happening.

2 MS. ARG0: Yes, Your Honor.

3 THE COURT: So you can start chopping it down and  
4 submit a copy to Ms. Seltzer and we will hear from -- again,  
5 that was not to prejudge, Ms. Seltzer, your argument that none  
6 of it is admissible, but I wanted to get to the size first,  
7 because in reading them yesterday with Mr. Herman, and it is  
8 highly repetitive.

9 MS. ARG0: Yes, Your Honor, we can certainly cut  
10 those down and actually provide additional sub-exhibits from  
11 the report.

12 THE COURT: They are not going to be read at trial  
13 and they are not going into the jury room.

14 MS. ARG0: Understood, Your Honor.

15 THE COURT: Okay.

16 MS. SELTZER: May I be heard, Your Honor?

17 THE COURT: Let's turn to you, Ms. Seltzer, your  
18 position, I assume is that none of it should go in at all.

19 MS. SELTZER: Well, I think there are two issues  
20 here. As I say, I received some documents yesterday on a disc  
21 and I received two lengthy sets of material today. Yesterday  
22 I was reviewing 3500, so I have not gotten to whatever it is  
23 that is --

24 THE COURT: We got to the disc. That is how we  
25 know.

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1 MS. SELTZER: So I think there are two issues: The  
2 first is statements by others, not Mr. Caroleo, which are  
3 hearsay. First of all, they are hearsay. Second, there's no  
4 proof that I am aware of that the others are necessarily  
5 minors.

6 THE COURT: The ones we are just simply talking now,  
7 there is no representation that they are. This relates to, I  
8 assume, the receipt and distribution counts.

9 MS. ARG0: So there are, in fact, conversations that  
10 take place with adults and the only conversations that take  
11 place with adults the Government seeks to introduce are any  
12 instance where either the defendant is, in fact, trading child  
13 pornography or he is boosting about the fact that he is  
14 receiving child pornography from minors. Other than that, the  
15 Government is actually saying these conversations did, in  
16 fact, take place with minors, the remainder of those  
17 conversations, Your Honor.

18 THE COURT: Those are the third-party ones -- I am  
19 thinking of the trading one.

20 MS. ARG0: Yes, Your Honor.

21 THE COURT: There is no representation that that was  
22 with a minor, is there?

23 MS. ARG0: No, Your Honor. Those we believe to be  
24 with an adult, two adults.

25 MS. WASHINGTON: Right. Just so the record is

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1 clear, those two chats are -- the two chats in which the  
2 defendant is trading child pornography with other adults, that  
3 is 402-K. That's an chat with an individual named Ben Brink.  
4 And then there is 402-L and that chat is actually charged  
5 conduct. That is the actual parts of Counts One, Two and  
6 Three.

7 THE COURT: And refresh me again, those are the  
8 receipt and distribution counts?

9 MS. ARG0: Yes, Your Honor.

10 MS. WASHINGTON: Correct.

11 And then there is one chat that is Government  
12 Exhibit 402-N, and that is text messages in which the  
13 defendant is bragging about receipt of child pornography.

14 THE COURT: Right.

15 MS. SELTZER: Your Honor, to be honest, I have not  
16 seen 402-N. I have read some reports about it, but I have not  
17 had the opportunity yet to examine these exhibits. So to some  
18 extent, I am at a lost. They were provided to me yesterday.

19 MS. ARG0: Your Honor, just to be clear, as far as  
20 where these exhibits are coming from, they are coming from  
21 documents that have been in Ms. Seltzer's possession for quite  
22 some time and they are searchable. So if there are any words  
23 or particular names or anything, a keyword that Ms. Seltzer  
24 would like to search within those documents that we provided,  
25 they are completely searchable.



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1 MS. SELTZER: Now that I know the name Tolendini in  
2 the 48,000 pages.

3 THE COURT: Either that, she would have need a Ouija  
4 board.

5 MS. SELTZER: As I say, I know what the report --  
6 the 3500 says about Mr. Tolendini. From what I know, I do not  
7 believe the Government has met a threshold showing that  
8 support its argument by reading the message, which I only have  
9 the 3500 material from the agent or from whatever -- from Mr.  
10 Tolendini. I haven't actually seen the message.

11 MS. ARG0: Your Honor --

12 MS. SELTZER: If he doesn't testify, I suggest it's  
13 hearsay.

14 MS. ARG0: May I respond to that, Your Honor?

15 THE COURT: Yes, please.

16 MS. ARG0: With respect to any statements from  
17 third-parties in relation to a text message or a chat  
18 conversation with the defendant, as previously stated,  
19 801(d)(2) makes his statements, the defendant's statements  
20 admissible, but also third-party statements, and there is tons  
21 of case law on this, Your Honor, which we cited in our brief,  
22 that third-party statements do come in to make clear the  
23 context of the defendant's statements, to shed light on the  
24 defendant's own mental state, to understand the effect of  
25 those statements on the listener, as well as the defendant.

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1 They also come in because they are also uncharged conduct.

2 So with respect to the Mr. Tolendini conversation,  
3 Mr. Caroleo actually does distribute child pornography in that  
4 chat. So, to be clear, that is actually uncharged conduct.  
5 So under 404(b), this proves motive, intent, preparation,  
6 plan, knowledge, identity, absence of mistake or lack of  
7 accident. So that quite clearly falls within the parameters  
8 of 404(b)(2).

9 THE COURT: Be careful. You are going to have to  
10 alert the Court to this, Ms. Argo as we go along. I agree  
11 with all of that, and keeping a road map for what purpose  
12 something is coming in. If it is 404(b), it is coming in with  
13 a cautionary instruction that it wouldn't have otherwise.

14 MS. ARGO: Of course, Your Honor. We can certainly  
15 provide that additional sort of cuing to the Court.

16 THE COURT: Once we have given the instruction, we  
17 can say that is for that purpose.

18 MS. ARGO: Absolutely, Your Honor.

19 THE COURT: And there is going to be an agent who is  
20 going to describe, I assume, how everything was extracted?

21 MS. ARGO: Yes, Your Honor. There is going to be a  
22 forensic examiner from the FBI who is going to go through  
23 that.

24 THE COURT: And that gets connected up. And as I  
25 understand it from something I listened to yesterday, there is

1 no challenge by the defense that these things came off a  
2 device that was owned and controlled by Mr. Caroleo.

3 MS. ARG0: Certainly the Government would state that  
4 with respect to the one phone that was seized from his person,  
5 we believe that there's going to be an agreement to that  
6 effect so we don't have to get into the circumstances of the  
7 arrest.

8 THE COURT: And that is where these text messages  
9 come from?

10 MS. ARG0: Some of them came from that and then some  
11 came from devices that were seized within the defendant's  
12 home, which brings us to another portion of what we would like  
13 to sort of flag for Your Honor and defense counsel, which is  
14 that the defendant did make statements in non-custodial  
15 interview in which he claimed ownership of the tablet, the  
16 fact that he owned a Droid and an HTC phone. He also  
17 identified his own phone number and made numerous admissions  
18 about those devices actually being his and that the user name  
19 on Kik, Nimfeater belonged to him. So to the extent those are  
20 obviously his admissions, just as the letter that he submitted  
21 to the Court in which he waived his attorney-client  
22 privilege --

23 THE COURT: We will get to that later. Let's keep  
24 them all separate.

25 MS. ARG0: All right.

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1 THE COURT: Those statements were made to NYPD?

2 MS. WASHINGTON: To FBI.

3 THE COURT: To FBI agents.

4 MS. WASHINGTON: Yes.

5 MS. ARGO: We would only be seeking to admit those  
6 limited portions of the statement. There are obviously some  
7 false exculpatories and other self-serving statements that are  
8 made throughout that. It is a quite lengthy interview. We  
9 would only be seeking to show the ownership of the devices.

10 MS. SELTZER: We are not stipulating to that, Your  
11 Honor. We are only stipulating to the device -- the one phone  
12 that was seized by the Manhattan DA.

13 THE COURT: Ms. Argo has cleared that up. They are  
14 going to lay the foundation through Mr. Caroleo's statement to  
15 the FBI as to those devices.

16 MS. ARGO: Yes, Your Honor.

17 THE COURT: As I understand it.

18 MS. SELTZER: There are two more Kik chats that are  
19 referenced 402-0 and 402-P in the exhibit list. I have not  
20 had an opportunity to review those yet.

21 THE COURT: What are they, Ms. Argo?

22 MS. ARGO: Yes, Your Honor. 402-0 consists of one  
23 page. It is simply I think a three-message chat between the  
24 defendant and an individual identified as KateS..001 in which  
25 he provides his name, his phone number, where he is located in

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1 a message to this individual. So it is simply showing  
2 attribution, ownership, the fact that it is, in fact, Mr.  
3 Caroleo who is using these devices or this particular device.

4 With respect to 402-P, that chat is with another  
5 minor. So that is actually uncharged conduct in which he is  
6 soliciting images from this individual and then proceeds to  
7 threaten this individual if she does not provide the pictures  
8 to him. Your Honor, it is a little bit lengthy and we are  
9 happy to condense that down to its sum and substance, if you  
10 will.

11 THE COURT: Is that person testifying at the trial?

12 MS. ARGO: No, she will not be testifying at the  
13 trial. However, again under 404(b), this would be uncharged  
14 conduct and this is something that would show that there is a  
15 lack of mistake, that this is intentional, that this is not an  
16 accident, that this is the modus operandi of the defendant.

17 THE COURT: What is going to be the offer of proof  
18 on that? The agent?

19 MS. ARGO: It would come in because it's in the  
20 devices that we will, I believe, lay the foundation to show  
21 that it belongs to the defendant and that this is a  
22 conversation that the defendant was having with another  
23 individual that an agent has, in fact, identified as a minor.

24 THE COURT: That is the key piece.

25 MS. ARGO: Yes.

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1 THE COURT: What is the evidence that is coming  
2 before the jury that that is the case?

3 MS. WASHINGTON: The agent will testify, based on  
4 her training and experience, that essentially from looking at  
5 pictures and images of the chest area of the child, the pubic  
6 area of the child indicate that it is, in fact, a minor  
7 involved.

8 THE COURT: So there is a picture attached to that?

9 MS. WASHINGTON: There are pictures and this is also  
10 an individual that the FBI agent has interviewed and met.

11 MS. SELTZER: Your Honor, I don't mean to get  
12 technical, but how is somebody an expert in recognizing the  
13 pubic area and chest area of a minor? We are already getting  
14 started with this stuff.

15 THE COURT: They have to be prepared to lay a  
16 foundation for that. If you want to voir dire them on how  
17 they know that. If they seem to be satisfied at the end of  
18 your voir dire that there will be sufficient evidence in the  
19 record to satisfy me that there is a basis for their  
20 conclusion that that is within their competence. I think the  
21 reality here is going to be, in addition to that, I'm  
22 gathering, I think it was Ms. Washington who said, that the  
23 agent who is testifying has actually seen the child I assume  
24 fully clothed.

25 MS. WASHINGTON: Yes. That's correct.

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1 THE COURT: And it is based on that observation,  
2 which law enforcement officers are trained to do, pegs the  
3 person as being someone under the age of 18, which doesn't  
4 really require great expertise, Ms. Seltzer. Based on what I  
5 am hearing, I assume they are going to be able to lay that  
6 foundation assuming the agent testifies the way it has been  
7 described.

8 MS. ARG0: Yes, Your Honor, that would be what the  
9 Government intends to do.

10 THE COURT: It is going to be important, and get  
11 them as quickly as you can to Ms. Seltzer and to us, we have  
12 jury selection on Monday, to get us your proposed cutdown  
13 exhibits and I have a nifty red pen.

14 MS. ARG0: Absolutely, Your Honor, we will most  
15 certainly do that.

16 THE COURT: I mean, I can't get this Ben text thing  
17 out of my mind. It was just over and over and over. It was  
18 the same conversation.

19 MS. WASHINGTON: I can say on the record exactly  
20 what the Government intends to show and we can cut it down to  
21 that portion, which is that at one point the defendant sends a  
22 video of one of the Jane Does to this Ben Brink individual.  
23 So that is a limited portion that we would like to show. And  
24 then the second piece is --

25 THE COURT: There was some -- look, listening to it,

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1 there were some that are far more probative than others.

2 MS. WASHINGTON: Yes.

3 THE COURT: There is no question about that. I  
4 assume those are the ones you will focus on.

5 MS. WASHINGTON: That is correct, Your Honor. And  
6 then there is only one other chat that we will probably  
7 include. So we can cull that down.

8 THE COURT: Yes, because it is just not going to  
9 happen.

10 MS. ARGO: Yes, Your Honor, we can do that.

11 THE COURT: Is there any other point that you have  
12 on that, Ms. Seltzer? I don't want to cut you off.

13 MS. SELTZER: No, only the arguments that were made  
14 in my memo.

15 THE COURT: Let's go back, Ms. Argo. There is  
16 another classification, too, is there not, of texts to  
17 victims?

18 MS. ARGO: Yes, Your Honor.

19 THE COURT: The victims are testifying or not?

20 MS. ARGO: Yes. The victims will be -- there are  
21 three victims who are named in the indictment and who will be  
22 here present testifying, yes, Your Honor. And then there will  
23 be some of these chats that will be gone through with the  
24 forensic examiner who actually did the extraction report or  
25 examined or peer reviewed the phone report and we will go



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1 through those chats.

2 THE COURT: Obviously the same restriction. The  
3 couple of the ones that we went over didn't seem anywhere near  
4 as long as the one, but there were some that had those  
5 multi-date kind of things, which are, to me, a tip off that  
6 it's too long.

7 MS. ARG0: Understood, Your Honor. We can  
8 definitely trim those down.

9 THE COURT: So you understand. That is good.

10 MS. ARG0: We do. Thank you, Your Honor.

11 THE COURT: And you have no points with respect to  
12 that, Ms. Seltzer?

13 MS. SELTZER: Nothing further, no.

14 THE COURT: Keep going then, Ms. Argo. I know there  
15 were other applications.

16 MS. ARG0: Yes, Your Honor. So, with respect to  
17 what the defendant filed on the docket, that was back in  
18 September, I believe, the defendant filed numerous  
19 conversations between himself and his attorneys discussing  
20 details of the case. In one such e-mail, which is page 4 of  
21 11 in document 72 filed on the public docket, Mr. Caroleo  
22 makes a statement that I had 4,000 pictures in my phone, 99.5  
23 percent of them were architecture sites, family and pets, less  
24 than one percent were of the victims. That portion of the  
25 sentence we believe should come in as an admission by the

1 defendant.

2           Finally, near the end of that particular e-mail, Mr.  
3 Caroleo makes a statement "I am guilty of having pictures of  
4 adolescent children and sexting." I want to say those two  
5 statements are admissions of the defendant and because Mr.  
6 Caroleo purposefully waived the privilege between an attorney  
7 and his client -- I'm sorry, the attorney and her client,  
8 those particular admissions should come in and none of the  
9 other exculpatory statements and self-serving statements  
10 should come in. I should add -- I'm sorry, Your Honor -- just  
11 as with his non-custodial interview as well.

12           MS. SELTZER: Your Honor, again, I addressed that in  
13 my memo. I think that it is clear that this is a man who is  
14 not schooled and certainly did not understand the implications  
15 of filing the letter that he filed and the communication that  
16 he had had with me and certainly didn't intentionally waive  
17 his attorney-client privilege. It just so flies in the face  
18 of that privilege. I understand the Government's argument.  
19 It was not done knowingly. It was not done knowingly and  
20 intentionally.

21           THE COURT: I will be honest, I was unaware that  
22 those letters were actually put on the public file by the  
23 clerk, but I am advised that is indeed the normal practice in  
24 this electronic age. In the old days, a letter addressed to a  
25 judge would have been put in the mailbox of the judge and that

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1 would have been the only place it would have been disseminated  
2 to.

3 I am going to give you both a chance to write a  
4 little bit more and if you can get something in by the close  
5 of business tomorrow. It is a very troubling issue. There is  
6 no question that the two excerpts that Ms. Argo has given us  
7 are classic admissions and would be admissible clearly.

8 We are obviously dealing with a pro se who is not  
9 experienced in the law and the like. The excerpts that the  
10 Government wishes to use really had nothing to do with the  
11 purpose that Mr. Caroleo had in sending the letter in the  
12 first place. He was referencing I guess his efforts to  
13 continue to try to make a point about how he got remanded on  
14 the GPS coordinates, trying to argue that counsel, Ms. Seltzer  
15 and her predecessors, for that matter, would not take up the  
16 cudgels to argue that this was an example of the Government  
17 being vindictive or manipulative and setting him up. The fact  
18 of the matter is that pretrial services doesn't even work for  
19 the Government; they work for the Court, number one, and the  
20 fact that he was remanded had nothing to do with the  
21 coordinates, it had to do with his admission in open court,  
22 that he was at the location that he was at. It did not have  
23 to be verified by the GPS coordinates because he admitted  
24 where he was. That is why he got remanded.

25 All of that being said, this aspect of what was set

1    forth in the e-mails that were attached to show the other  
2    point, there is no connection whatsoever. That is not what he  
3    intended to show when he sent the letter to me to make the  
4    other point.

5            I do have some of the concerns that Ms. Seltzer has  
6    articulated, which are serious. There is an argument under  
7    504(b) of the Federal Rules of Evidence which would suggest  
8    that that inadvertence excuses what otherwise would have been  
9    a clear waiver of privilege, because there is no question that  
10   he attached the e-mails containing the privilege information.  
11   There is no question that he then mailed the letter to someone  
12   other than his lawyer, whether it is me or the clerk, it  
13   doesn't matter, that is a waiver, whether that is done  
14   intentionally, it is a waiver of privilege. 504(b) deals with  
15   inadvertence.

16           And 504(d) is essentially a notwithstanding  
17   subsection that says the totality of the circumstances,  
18   perhaps the conduct that would otherwise be a clear waiver  
19   should be disregarded and the privileged information, very  
20   much as we do on the civil side and even on the criminal side  
21   when we get these terabytes of documents to facilitate a more  
22   rapid production of electronically maintained documents, to  
23   allow privileged documents to be clawed back. So you may  
24   write simultaneously, if you care to, and the Court will  
25   evaluate its position, if you want to give us something by

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1 close of business tomorrow as to whether or not under 504(b)  
2 this is an inadvertence that excuses the waiver. And perhaps,  
3 more significantly, depending on the answer to that, whether  
4 under 504(d) these are circumstances in which the Court should  
5 exercise its power to excuse the waiver. So we look forward  
6 to your writings with respect to that issue. File it on the  
7 docket by close of business tomorrow.

8 MS. SELTZER: Thank you, Judge.

9 MS. ARGO: Thank you, Your Honor.

10 MS. SELTZER: It will be done.

11 THE COURT: Ms. Argo, I think there is still more on  
12 your agenda.

13 MS. ARGO: Yes, Your Honor. I believe the other  
14 statements that we referenced beyond the statements within the  
15 publicly filed document were statements that he made to FBI  
16 agents in a non-custodial interview, we would only be seeking  
17 to introduce the portions that attribute his ownership of his  
18 devices and the ownership of his Kik username and that is  
19 truly all that the Government is seeking to admit.

20 THE COURT: Do you have any view on that, Ms.  
21 Seltzer?

22 MS. SELTZER: No, Judge.

23 THE COURT: You are a delight to work with, Ms.  
24 Seltzer, because you are forthright. You don't have a  
25 legitimate objection and you didn't make one. The Government

1 is right and she has permission to do exactly what she is  
2 requesting to do.

3 MS. ARG0: Thank you, Your Honor.

4 Lastly, I think the only thing left on the  
5 Government's motion --

6 THE COURT: There is one thing I want to raise. In  
7 our scurrying around, more precisely Jonathan's scurrying  
8 around, it came up in a case recently, a child pornography  
9 case recently before Judge Block where the parties agreed  
10 that, notwithstanding any of the other issues in the case,  
11 that with respect to the specific images that were going to be  
12 used in the case, there was a stipulation that indeed those  
13 images qualified as child pornography without having to  
14 display the images to the jury.

15 Is there any sense that the parties here would  
16 subscribe to the same stipulation?

17 MS. WASHINGTON: Your Honor, the Government is not  
18 prepared to stipulate in this particular case in part because  
19 there are the sexual exploitation of minor charges where there  
20 are Jane Does who are going to be testifying who are going to  
21 need to identify themselves as the minor in those videos. In  
22 this circumstance we don't think it would be appropriate.

23 MS. ARG0: In addition, Your Honor, we went ahead  
24 and took the lead in introducing some limiting factors around  
25 introducing this particular child pornography. We have

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1 limited the images very strictly to just be within the  
2 indictment and provide context and only show them for a few  
3 seconds.

4 THE COURT: I was wondering whether we could pursue  
5 it or not. The sexual exploitation counts were a stumbling  
6 block. I was hoping if everybody was interested in doing  
7 that, you all could come up with a workaround.

8 MS. ARG0: Yes.

9 THE COURT: That is where we sort of stumbled  
10 yesterday as well in our thinking process. I thought I would  
11 throw it out and see if the parties were interested.  
12 Apparently not.

13 MS. ARG0: We understand, Your Honor. We feel we  
14 have to meet our burden.

15 THE COURT: It is an unpleasant task that the jurors  
16 will have to perform. If we can spare them at least that  
17 aspect, I was hoping.

18 MS. ARG0: Understood.

19 THE COURT: That is not to be.

20 I think there is still even more, is there not?  
21 Because that tied in to really is there more because I believe  
22 the parties have agreed on a protocol of how these images will  
23 be handled.

24 MS. ARG0: Yes.

25 THE COURT: We have not discussed that because

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1 everybody is on the same page with respect to that.

2 MS. ARG0: Yes, Your Honor.

3 MS. SELTZER: That's correct.

4 MS. ARG0: We have I think two remaining issues. Is  
5 it three? Sorry. Right. So, with respect to specific  
6 instances of conduct if the defendant chooses to testify at  
7 trial. There are several instances within the devices that  
8 were seized that are instances of lies and deceit that are  
9 very specifically attributable to the defendant and  
10 demonstrate his character for untruthfulness. The Government  
11 would respectfully request that it be permitted to inquire  
12 upon cross-examination regarding those specific instances.  
13 That would include attempting to falsify a urinalysis screen  
14 with his employer, the use of an opioid substance for which he  
15 did not have a prescription, and pretending to be a 19- or  
16 17-year-old in certain instances. Those would all be examples  
17 of instances of untruthfulness for which we would seek to  
18 cross-examine the defendant if he takes the stand.

19 THE COURT: Ms. Seltzer.

20 MS. SELTZER: Well, as I stated again in my letter,  
21 I don't anticipate that my client will testify. I think he  
22 understands his rights. He has been advised of his rights and  
23 he has been advised of the charge that the Court will give the  
24 jury if he does not testify.

25 THE COURT: I will.



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1 MS. SELTZER: Our present intention is that he will  
2 not testify.

3 THE COURT: All right. So we will keep that on the  
4 back burner for now, Ms. Argo, and we will address that as we  
5 get closer.

6 Mr. Caroleo, to give you a preview, at some point,  
7 when it is the defense case, I am going to ask you personally  
8 whether it is your intent to testify or not. Until that time  
9 comes, you can continue to work with counsel and make your  
10 mind up.

11 THE DEFENDANT: Thank you, Your Honor.

12 THE COURT: We are not locking you in. What Ms.  
13 Seltzer said to the Court now does not lock you in to any  
14 decision one way or the other. That is going to be up to you  
15 when the time comes.

16 THE DEFENDANT: Thank you.

17 MS. WASHINGTON: Two final things. The last thing  
18 in our motion that was filed on Friday, November 1st is with  
19 respect to the evidence related to the seizure of the phone,  
20 specifically seized from the phone from his person in  
21 connection with the assault arrest. I think the parties have  
22 agreed to a stipulation that will cover this issue so we don't  
23 need to bring in anyone from the NYPD to testify even in a  
24 limited fashion. I think that is taken care of.

25 THE COURT: That is fine. That makes sense.

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1 MS. SELTZER: That's correct.

2 MS. WASHINGTON: And the last issue is with respect  
3 to a Giglio motion that the Government filed yesterday. It is  
4 standard Giglio disclosures regarding our Jane Does,  
5 specifically with respect to travel expenses, which the  
6 Government is not seeking to limit any cross-examination about  
7 that, that goes to bias, and Ms. Seltzer would be well within  
8 her right to cross examine about that, but there is certain  
9 information about Jane Doe that we have provided that we  
10 believe just -- it does not going to untruthfulness or  
11 truthfulness, it would be basically harassment if  
12 cross-examination --

13 MS. SELTZER: Is Jane Doe one of the victims?

14 MS. WASHINGTON: Yes, Jane Doe Two. So there are  
15 three Jane Does.

16 MS. SELTZER: Because we have been referring to  
17 these people as victim one, victim two, victim three, and then  
18 we have first names. I want to make sure I'm on the same  
19 page.

20 MS. ARGO: The only reference is Jane Doe One  
21 through Three in the indictment, and then in our 3500  
22 materials and in the exhibits, they are referenced by their  
23 first names. So those are the only two types of ways we have  
24 been referring to them.

25 MS. SELTZER: Okay.

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1 THE COURT: Do you have any problems with that?

2 MS. SELTZER: No, I didn't want to see a new Jane  
3 Doe appear on the horizon.

4 THE COURT: That is resolved by agreement.  
5 Anything else on the Government side?

6 MS. ARG0: I believe that is it, Your Honor. Thank  
7 you.

8 THE COURT: Ms. Seltzer, do you have anything that  
9 you --

10 MS. SELTZER: Just some housekeeping issues.

11 THE COURT: Yes, please.

12 MS. SELTZER: I would like to request that the Court  
13 permit us to have daily copy. We have spoken to the court  
14 reporter and I think the understanding would be that we would  
15 split the cost with the Government and the CJA.

16 THE COURT: That is your understanding as well Ms.  
17 Argo?

18 MS. ARG0: Yes, Your Honor.

19 THE COURT: I think it is certainly appropriate and  
20 the Court will order it.

21 MS. SELTZER: My only other request is to know that  
22 the schedule. If we are picking a jury on Tuesday, is it Your  
23 Honor's intention to begin on Wednesday or if it takes a  
24 shorter time to pick a jury, is it Your Honor's intention to  
25 start sometime on Tuesday?

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1 THE COURT: I think we would start on a fresh day.  
2 I would think that this is going to be a fairly lengthy voir  
3 dire, unless you all think I am wrong.

4 MS. WASHINGTON: We agree.

5 THE COURT: In fact, we have ordered, in  
6 consultation with some of the people whose hair is even grayer  
7 than mine, if that's possible, we have ordered an extra  
8 allotment of jurors. Everyone thinks it will be a long day on  
9 Tuesday for jury selection.

10 MS. SELTZER: Okay.

11 THE COURT: This way we can take one worry off the  
12 worry plate and we will start on Wednesday as a fresh day.

13 MS. SELTZER: I have been advised that Your Honor  
14 does not sit on Fridays; is that correct?

15 THE COURT: Well, it gets a little squirrely as we  
16 get towards the end of the year. I am not going to say that  
17 to anybody. Depending on the pace of the trial, it may very  
18 well be that if we can rearrange my other calendar and have a  
19 half a day on Friday. So no one should plan on Friday being  
20 off. The only days that anybody should plan on not being here  
21 are on Thanksgiving Day and the day after. I have already had  
22 the bad reputation of bringing in a jury on Columbus day. I  
23 don't want to add to my bad reputation to bring somebody in on  
24 a Friday after Thanksgiving as well.

25 Trials are what they are. We will work it as long

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1 as we have to work it. I think those who have been before me,  
2 and unfortunately the reporters know this very well, I can't  
3 see the clock so very well. In fact, I can't see the clock at  
4 all. So five o'clock is not an important number. It depends  
5 on the trial. If that's helpful for planning purposes.

6 MS. SELTZER: My only other planning purpose request  
7 is that the Government provide me with the order of their  
8 witnesses so that we can be prepared for the ones coming each  
9 day. They don't have to do it this second.

10 THE COURT: They will give you a couple of days in  
11 advance.

12 MS. ARGO: We will do the very best we can on that,  
13 Your Honor. The only issue is, as Your Honor says, the flow  
14 of trial.

15 THE COURT: You never know if somebody has to be in  
16 Pittsburgh on Tuesday and now he is on the stand on Monday.  
17 Things happen. We try to accommodate witnesses. I don't know  
18 if you have any out-of-town witnesses coming. But  
19 particularly if they are out of town.

20 MS. WASHINGTON: We do. All three Jane Does are.

21 THE COURT: The Jane Does are, for example, in that  
22 case. Particularly around the holiday season, which also  
23 brings us to the weather season. People may be traveling and  
24 if the weather forecast is correct, maybe we will find out if  
25 that includes tomorrow, people may have weather issues. I

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1 guess we just have to keep our feet moving and respond as we  
2 need to. That is the plan.

3 Now that the Government is getting closer to the  
4 beginning of trial, what is the Government's current trial  
5 time estimate?

6 MS. WASHINGTON: We estimate about three to four  
7 days.

8 THE COURT: Days, okay. I thought you were going to  
9 say weeks.

10 We will sort of gauge it, Ms. Seltzer, on those  
11 first few days, and to the extent we can eliminate Fridays out  
12 of our mind, that is fine. But if we can't, we can't.

13 MS. SELTZER: No problem. I was just anxious to  
14 know.

15 THE COURT: And somebody might mention -- I don't  
16 know if we mentioned it to Judge Scanlon or not, but somebody  
17 might mention to Judge Scanlon, and William you can pass it  
18 along, counsel can double-check on selection day, that not to  
19 promise the jurors that they are off on Friday.

20 THE COURTROOM DEPUTY: I already did.

21 THE COURT: Did you handle that already?

22 THE COURTROOM DEPUTY: Just now.

23 THE COURT: William is a mind reader.

24 Again, I think this time of year is a little -- we  
25 have another case that is marked ready subject to this thing,

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1 so we don't want to start crowding everybody. In fact, I  
2 think they select before we finish.

3 THE COURTROOM DEPUTY: I believe so.

4 THE COURT: I think they select before we finish.  
5 It wouldn't be the first time we have had two juries at one  
6 time. It has been awhile.

7 Do we have anything else?

8 MS. WASHINGTON: Just a couple of other housekeeping  
9 matters.

10 THE COURT: Yes.

11 MS. WASHINGTON: With respect to movement about the  
12 courtroom, would you prefer we ask for permission before we  
13 approach a witness or do we have a standing permission?

14 THE COURT: You can approach the witness. From a  
15 trial strategy, I think people lapse into their normal  
16 routine. I think you all want to do the same thing, rather  
17 than stand out. If Ms. Seltzer lapses into the way we were  
18 taught when we were kids, and you don't do it, maybe somebody  
19 on the jury sees it. I think people who have been before me  
20 know I sort of let lawyers try their cases, don't save them  
21 and don't try the case for them. So think like that.

22 MS. WASHINGTON: All right. Will do.

23 And then we wanted to find a time to test the  
24 courtroom equipment. William has advised.

25 THE COURT: William, do you know where Judge Scanlon

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1 is selecting?

2 THE COURTROOM DEPUTY: She will be selecting here.

3 THE COURT: So you will be here on the day before  
4 trial. It will give you a perfect opportunity to test out the  
5 equipment. You will be here for jury selection.

6 MS. ARGO: Thank you, Your Honor.

7 THE COURT: Okay. Anything else?

8 MS. SELTZER: No, Your Honor.

9 THE COURT: Give me my memorandum by tomorrow.

10 MS. SELTZER: Will do, Your Honor.

11 MS. ARGO: No problem.

12 THE COURT: Good luck to both sides. We will see  
13 you on Wednesday. Judge Scanlon will see you on Tuesday.

14 MS. ARGO: Thank you.

15 THE DEFENDANT: Thank you, Your Honor.

16 THE COURT: You're welcome, Mr. Caroleo.

17 (Matter concluded.)  
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